in Critical Mass.[303] There, the panel adopted what it termed the "persuasive" reasoning of the First Circuit and expressly held that an agency may invoke Exemption 4 on the basis of interests other than the two principally identified in National Parks.[304]

Upon remand from the D.C. Circuit, the district court in Critical Mass found the requested information to be properly withheld pursuant to the third prong.[305] The court reached this decision based on the fact that if the requested information were disclosed, future submissions would not be provided until they were demanded under some form of compulsion--which would then have to be enforced, precipitating "acrimony and some form of litigation with attendant expense and delay."[306] On appeal for the second time, a panel of the D.C. Circuit reversed the lower court on this point, but that decision was itself vacated when the D.C. Circuit decided to hear the case en banc.[307]

In its en banc decision in Critical Mass, the D.C. Circuit conducted an extensive review of the interests sought to be protected by Exemption 4 and expressly held that "[i]t should be evident from this review that the two interests identified in the National Parks test are not exclusive."[308] In addition, the D.C. Circuit went on to state that although it was overruling the first panel decision in Critical Mass, it "note[d]" that that panel had adopted the First Circuit's conclusion in 9 to 5 that Exemption 4 protects a "governmental interest in administrative efficiency and effectiveness."[309] Moreover, the D.C. Circuit specifically recognized yet another Exemption 4 interest--namely, "a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis."[310] It declined to offer an opinion as to whether any other governmental or

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[303] 830 F.2d 278, 282, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992).

[304] Id. at 286.

[305] 731 F. Supp. 554, 557 (D.D.C. 1990), rev'd in part & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

[306] Id.

[307] 931 F.2d 939, 944-45 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

[308] 975 F.2d at 879.

[309] Id.; see also Allnet, 800 F. Supp. at 990 (recognizing, after Critical Mass, third prong protection to prevent agency effectiveness from being impaired).

[310] 975 F.2d at 879.

private interests might also fall within Exemption 4's protection.[311]

The Court of Appeals for the Second Circuit--in the course of reviewing a decision of the District Court for the Southern District of New York which had afforded protection to documents based upon application of the third prong --expressly declined to consider whether that application was "properly afforded."[312] In so doing, the Second Circuit noted that while it had previously "adopted the National Parks formulation of Exemption 4," that "adoption did not encompass the speculation regarding `program effectiveness'" that was set forth in National Parks.[313]

Privileged Information

The term "privileged" in Exemption 4 has been utilized by some courts as an alternative for protecting nonconfidential commercial or financial information. Indeed, the Court of Appeals for the District of Columbia Circuit has indicated that this term should not be treated as being merely synonymous with "confidential," particularly in light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and doctor-patient privileges.[314] Nevertheless, during the FOIA's first two decades, only two district court decisions had discussed "privilege" in the Exemption 4 context.

In one case, a court upheld the Department of the Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were "privileged" because of their work-product nature within the meaning of Exemption 4: "The vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests. Such communications are entitled to protection as attorney work product."[315] In the second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege.[316] In both of these cases the information was withheld also as "confidential."

It was not until another five years had passed that a court protected material relying solely on the "privilege" portion of Exemption 4--specifically, by recog-

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[311] Id.

[312] Nadler v. FDIC, 92 F.3d 93, 96 (2d Cir. 1996).

[313] Id. at n.2 (citing Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373, 375 (2d Cir. 1977)).

[314] Washington Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

[315] Indian Law Resource Ctr. v. Department of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979).

[316] Miller, Anderson, Nash, Yerke & Wiener v. United States Dep't of Energy, 499 F. Supp. 767, 771 (D. Or. 1980).

nizing protection for documents subject to the "confidential report" privilege.[317] In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents, but did not expressly characterize them as "privileged."[318] Another court subsequently recognized Exemption 4 protection for documents subject to the critical self-evaluative privilege.[319]

Sixteen years after the first decision that protected attorney-client information under Exemption 4, the District Court for the Eastern District of Missouri issued the second such decision.[320] The court held that a company's "adverse impact analyses, [prepared] at the request of its attorneys, for the purpose of obtaining legal advice about the legal ramifications of [large scale] reductions in force,"[321] were protected by the attorney-client privilege.[322] In so holding, the court found that disclosure of the documents to the agency "constituted only a limited waiver and did not destroy the privilege."[323]

On the other hand, the Court of Appeals for the Tenth Circuit has held that documents subject to a state protective order entered pursuant to the State of Utah's equivalent of Rule 26(c)(7) of the Federal Rules of Civil Procedure--which permits courts to issue orders denying or otherwise limiting the manner in which discovery is conducted so that a trade secret or other confidential commercial information is not disclosed or is only disclosed in a certain way--were not "privileged" for purposes of Exemption 4.[324] While observing that discovery privileges "may constitute an additional ground for nondisclosure" under Exemp-

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[317] Washington Post Co. v. HHS, 603 F. Supp. 235, 237-39 (D.D.C. 1985), rev'd on procedural grounds & remanded, 795 F.2d 205 (D.C. Cir. 1986).

[318] M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986); see also FOIA Update, Fall 1985, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations").

[319] Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). But cf. Kansas Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (because self-critical analysis privilege previously rejected in state court proceeding brought to suppress disclosure of documents, "doctrine of collateral estoppel" precluded "relitigation" of that claim in federal court) (reverse FOIA suit).

[320] McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 237, 242-43 (E.D. Mo. 1996) (alternative holding) (reverse FOIA suit), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996).

[321] Id. at 237.

[322] Id. at 242-43.

[323] Id. at 243.

[324] Anderson v. HHS, 907 F.2d 936, 945 (10th Cir. 1990).

tion 4, the Tenth Circuit noted that those other privileges were for information "not otherwise specifically embodied in the language of Exemption 4."[325] By contrast, it concluded, recognition of a privilege for materials protected by a protective order under Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of `trade secrets and commercial or financial information.'"[326] Similarly, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege," despite the express reference to such a privilege in Exemption 4's legislative history.[327]

Interrelation with Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act[328]--an extraordinarily broadly worded criminal statute--prohibits the disclosure of much more than simply "trade secret" information and instead prohibits the unauthorized disclosure of all data protected by Exemption 4.[329] (See discussion of this statute in Exemption 3, Additional Considerations, above.) Indeed, virtually every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be "coextensive."[330] In 1987, the Court of Appeals for the District of Columbia Circuit issued a long-awaited decision which contains an extensive analysis of the argument advanced by several commentators that the scope of the Trade Secrets Act is narrow, extending no more broadly than the scope of its three predecessor statutes.[331] The D.C. Circuit rejected that argument and held that the scope of the Trade Secrets Act is "at least co-extensive with that of Exemption 4."[332] Thus, the

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[325] Id.

[326] Id.

[327] Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir. 1985).

[328] 18 U.S.C. § 1905 (1994).

[329] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987) (noting that Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source" and that "comprehensive catalogue of items" listed in Act "accomplishes essentially the same thing as if it had simply referred to `all officially collected commercial information' or `all business and financial data received'") (reverse FOIA suit).

[330] See, e.g., General Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (reverse FOIA suit).

[331] CNA, 830 F.2d at 1144-52.

[332] Id. at 1151; accord Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (citing CNA, court declares: "[W]e have held that information falling within Exemption 4 of [the] FOIA also comes within the Trade Secrets Act.") (non-FOIA case brought under Administrative Procedure Act). But see

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court held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.[333]

The Trade Secrets Act, however, does not preclude disclosure of information "otherwise protected" by that statute, if the disclosure is "`authorized by law.'"[334] (For a further discussion of this point, see "Reverse" FOIA, below.) For that reason, the D.C. Circuit has concluded that it need not "attempt to define the outer limits" of the Trade Secrets Act, i.e., whether information falling outside the scope of Exemption 4 was nonetheless still within the scope of the Trade Secrets Act, because the FOIA itself would provide authorization for release of any information falling outside the scope of an exemption.[335]

The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise-exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute "a serious abuse of agency discretion" redressable through a reverse FOIA suit.[336] Thus, in the absence of a statute or properly promulgated regulation giving the agency authority to release the information--which would remove the disclosure prohibition of the Trade Secrets Act[337]--a deter

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McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1165 n.2 (D.C. Cir. 1995) (noting in dicta that court "suppose[s] it is possible that this statement [from CNA] is no longer accurate in light of [the court's] recently more expansive interpretation of the scope of Exemption 4" in Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992)).

[333] CNA, 830 F.2d at 1151-52; see also Bartholdi, 114 F.3d at 281 (when information shown to be protected by Exemption 4, government is generally "precluded from releasing" it due to provisions of Trade Secrets Act).

[334] Bartholdi, 114 F.3d at 281 (quoting Trade Secrets Act).

[335] CNA, 830 F.2d at 1152 n.139; see also Frazee v. United States Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996) (holding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act") (reverse FOIA suit).

[336] National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord McDonnell Douglas, 57 F.3d at 1164 (Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as `contrary to law' within the meaning of the Administrative Procedure Act"); Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (reverse FOIA suit); see also FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4"); accord FOIA Update, Spring 1994, at 3.

[337] See, e.g., McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (FAR disclosure provision served as legal authorization
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mination by an agency that material falls within Exemption 4 is "tantamount" to a decision that it cannot be released.[338]

EXEMPTION 5

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."[1] As such, it has been construed to "exempt those documents, and only those documents that are normally privileged in the civil discovery context."[2]

Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"[3] the Supreme Court has made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history.[4] Accordingly, the Court of Appeals for the District of Columbia Circuit has stated that the statutory language "unequivocally" incorporates "all civil discovery rules into FOIA [Exemption 5]."[5] However, this incorporation of discovery privileges requires that a privilege be applied in the FOIA context as it exists in the dis-

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for agency to release exercised option prices and thus such prices were "not protected from disclosure by the Trade Secrets Act"), and McDonnell Douglas Corp. v. Widnall, No. 92-2211, slip op. at 8 (D.D.C. Apr. 11, 1994) (same), cases consolidated on appeal & remanded for further development of the record, 57 F.3d 1162 (D.C. Cir. 1995) (non-FOIA cases brought under Administrative Procedure Act).

[338] CNA, 830 F.2d at 1144.

[1] 5 U.S.C. § 552(b)(5) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[2] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

[3] Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

[4] See United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); see also FOIA Update, Fall 1984, at 6. But see Burka v. HHS, 87 F.3d 508, 517 (D.C. Cir. 1996) (ruling that before certain material may be found privileged, agency must show that it is protected in discovery for reasons similar to those used by agency in FOIA context).

[5] Martin, 819 F.2d at 1185; see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("Exemption 5 requires the application of existing rules regarding discovery.").

covery context.[6] Thus, the precise contours of a privilege, with regard to applicable parties or types of information which are protectible, are also incorporated into the FOIA.[7]

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"), the attorney work-product privilege, and the attorney-client privilege.[8]

Initial Considerations

The threshold issue under Exemption 5 is whether a record is of the sort intended to be covered by the phrase "inter-agency or intra-agency memorandums," a phrase which would seem to contemplate only those documents generated by an agency and not circulated beyond the executive branch. In fact, however, in recognition of the necessities and practicalities of agency operations, the courts have construed the scope of Exemption 5 far more expansively and have included documents generated outside of an agency. This pragmatic approach has been characterized as the "functional test" for assessing the applicability of Exemption 5 protection.[9] However, some documents generated within an agency, but transmitted outside of the executive branch, have been found to fail this threshold test and thus not qualify for Exemption 5 protection.[10]

Regarding documents generated outside of an agency but created pursuant to agency initiative, whether purchased or provided voluntarily without compensation, it has been held that "Congress apparently did not intend `inter-agency and

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[6] See United States Dep't of Justice v. Julian, 486 U.S. 1, 13 (1988) (presentence report privilege, designed to protect report subjects, cannot be invoked against them as first-party requesters).

[7] See id.

[8] See Sears, 421 U.S. at 149; see also FOIA Update, Spring 1994, at 3-7 ("OIP Guidance: Applying the "Foreseeable Harm" Standard Under Exemption Five").

[9] See Durns v. Bureau of Prisons, 804 F.2d 701, 704 n.5 (D.C. Cir.) (employing "a functional rather than a literal test in assessing whether memoranda are `inter-agency or intra-agency'"), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); see also United States Dep't of Justice v. Julian, 486 U.S. 1, 11 n.9 (1988) (Scalia, J., dissenting) (issue not reached by majority).

[10] See, e.g., Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (agency records transmitted to Congress for purposes of congressional inquiry held not "inter-agency" records under Exemption 5 on basis that Congress is not an "agency" under FOIA); see also Paisley v. CIA, 712 F.2d 686, 699 n.54 (D.C. Cir. 1983) (presaging Dow Jones by suggesting that agency responses to congressional requests for information may not constitute protectible "inter-agency" communications).

intra-agency' to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process."[11] Thus, recommendations from Congress may be protected,[12] as well as advice from a state agency.[13] Similarly, the Court of Appeals for the District of Columbia Circuit has held that Exemption 5 likewise applies to documents originating with a court.[14] Under this "functional" approach, documents generated by consultants outside of an agency are typically found to qualify for Exemption 5 protection because agencies, in the exercise of their functions, commonly have "a special need for the opinions and recommendations of temporary consultants."[15] Indeed, it has been recognized that such advice can "play[] an integral function in the government's decision-[making]."[16]

Several years ago, the D.C. Circuit made broad use of the "functional" test, holding that Exemption 5's "inter-agency or intra-agency" threshold requirement was satisfied even where no "formal relationship" existed between HHS and an outside scientific journal reviewing an article submitted by an HHS scientist for

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[11] Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980); see also Hooper v. Bowen, No. 88-1030, slip op. at 18 (C.D. Cal. May 24, 1989) ("courts have regularly construed this threshold test expansively rather than hypertechnically"); FOIA Update, June 1982, at 10 ("FOIA Counselor: Protecting `Outside' Advice").

[12] See Ryan, 617 F.2d at 790 (protecting judicial recommendations from senators to Attorney General).

[13] See Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D.N.Y. 1976) ("the rationale applies with equal force to advice from state as well as federal agencies").

[14] See Durns, 804 F.2d at 704 & n.5 (presentence report prepared by probation officer for sentencing judge, with copies provided to Parole Commission and Bureau of Prisons); cf. Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5--without discussing "inter-agency and intra-agency" threshold--to material supplied by outside contractors).

[15] Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (recognizing importance of outside consultants in deliberative process privilege context).

[16] Hoover v. United States Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979); Wu v. National Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (recommendations of volunteer consultants protected); Hooper, No. 88-1030, slip op. at 17-19 (C.D. Cal. May 24, 1989) (records originating with private insurance companies which acted as "fiscal intermediaries" for Health Care Financing Administration protected); American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., 3 Gov't Disclosure Serv. (P-H) ¶ 83,182, at 83,846 (D.D.C. June 14, 1983) (documents prepared by paid outside consultants protected).

possible publication.[17] The D.C. Circuit held that the deciding factor is the "role" the evaluative comments from the journal's reviewers play in the process of agency deliberations--that is, they are regularly relied upon by agency authors and supervisors in making the agency's decisions.[18] Most recently, the D.C. Circuit has found the consultative relationship between former Presidents and agencies under the Presidential Records Act[19] to fall within the "functional" test framework.[20] While courts ordinarily require that there be some formal or informal relationship between the "consultant" and the agency, some courts have accorded Exemption 5 protection even absent such a relationship.[21]

However, a minority of courts, particularly in the context of witness statements taken in NLRB investigations, have not embraced the "functional test" and have rigidly applied the "inter-agency or intra-agency" language of Exemption 5's threshold to find that documents submitted by nonagency person-

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[17] Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989).

[18] Id. at 1123-24 (citing CNA, 830 F.2d at 1161); see also Weinstein v. HHS, No. 97-0307, 1997 WL 573410, at **1-2 (D.D.C. Sept. 10, 1997) (protecting evaluations by outside scientific experts utilized in "NIH's competitive grant application process"). But see Texas v. ICC, 889 F.2d 59, 62 (5th Cir. 1989) (embracing "functional test" but finding it not satisfied for documents submitted by private party not standing in any consultative or advisorial role with agency); Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, slip op. at 5 (D. Me. Apr. 18, 1995) (even assuming agency and Indian Nation "enjoy a trust relationship," intra-agency threshold not satisfied where agency "did not `call upon' the Nation to `assist in internal decision-making'"; instead "the Nation `approached the government with their own interest in mind,'" (quoting County of Madison v. United States Dep't of Justice, 641 F.2d 1036, 1040 (1st Cir. 1981))).

[19] 44 U.S.C. §§ 2201-07 (1994).

[20] Public Citizen, Inc. v. United States Dep't of Justice, 111 F.3d 168, 170-72 (1997) ("Consultations under the Presidential Records Act are precisely the type that Exemption 5 was designed to protect.").

[21] See Weinstein, 1997 WL 573410, at *3 (finding grant applicant's rebuttal letter not to be "intra-agency" but protecting it nevertheless because disclosure "would effectively expose the substance" of agency's underlying intra-agency recommendation (citing FBI v. Abramson, 456 U.S. 615 (1982))); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 10 (D.P.R. Sept. 22, 1988) (protecting confidential business information furnished to agency by business competitor); Information Acquisition Corp. v. Department of Justice, No. 77-839, slip op. at 4 (D.D.C. May 23, 1979) (protecting unsolicited comments from members of public on presidential nomination); see also FOIA Update, Summer 1987, at 4-5 ("OIP Guidance: Broad Protection for Witness Statements"); FOIA Update, June 1982, at 10.

nel are not protectible under the exemption.[22]

In 1990, the D.C. Circuit held in Dow Jones & Co. v. Department of Justice,[23] that documents transmitted to Congress do not qualify for Exemption 5 protection, based upon the simple fact that Congress is not an "agency" under the terms of the statute[24]--even though prior to Dow Jones, several district court decisions had accorded such documents protection under Exemption 5.[25] Nevertheless, the D.C. Circuit stated that agencies may "protect communications outside the agency so long as those communications are part and parcel of the agency's deliberative process."[26]

The issue remains unsettled as to documents generated in the course of settlement negotiations. Communications reflecting settlement negotiations between the government and an adverse party, which are of necessity exchanged between the parties, have been held not to constitute "intra-agency" memoranda under Exemption 5.[27] However, certain of those courts recog

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[22] See Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1259-60 (7th Cir. 1988) (witness statements taken from nonagency employees in contemplation of litigation held not intra-agency); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (Exemption 5 narrowly construed to apply "only to internal agency documents or documents prepared by outsiders who have a formal relationship with the agency"); Poss v. NLRB, 654 F.2d 659, 659 (10th Cir. 1977) (same); Aircraft Gear Corp. v. NLRB, No. 92-C-6023, slip op. at 6-10 (N.D. Ill. Mar. 14, 1994) (explicitly following Thurner); Kilroy v. NLRB, 633 F. Supp. 136, 140 (S.D. Ohio 1985) (witness statements taken from nonagency employees not intra-agency), aff'd, 823 F.2d 553 (6th Cir. 1987) (unpublished table decision); see also Southam News v. INS, No. 85-2721, slip op. at 17 (D.D.C. May 18, 1989) (letters to and from private parties held not to meet threshold); Knight v. DOD, No. 87-480, slip op. at 2-3 (D.D.C. Dec. 7, 1987) (correspondence to contractors not intra-agency); American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 3 (D.D.C. July 22, 1983) (advice of professional advisory committees does not merit protection as disclosure would not chill outsiders' candor).

[23] 917 F.2d 571 (D.C. Cir. 1990).

[24] Id. at 574 (citing 5 U.S.C. § 551(1) (1994)).

[25] See, e.g., Demetracopoulos v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,508, at 83,283 (D.D.C. Nov. 9, 1982) (documents transmitted to Congress); Letelier v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 82,257, at 82,714 (D.D.C. May 11, 1982) (same); see also FOIA Update, Spring 1983, at 5 (superseded in part by Dow Jones).

[26] 917 F.2d at 575.

[27] See County of Madison, 641 F.2d at 1042; M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (privilege allowed under Exemption 4 but not under Exemption 5); NAACP Legal Defense & Educ. Fund, Inc. v. United

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nized the great difficulties inherent in such a harsh Exemption 5 construction, especially in light of the "logic and force of [the] policy plea"[28] that the government's indispensable settlement mechanism can be impeded by such a result.[29]

Accordingly, one court has held that notes of an agency employee which reflected positions taken and issues raised in treaty negotiations were properly withheld pursuant to Exemption 5 because their release would harm the agency deliberative process.[30] Other courts have found the attorney work-product and deliberative process privileges to be properly invoked for documents prepared by agency personnel which reflected the substance of meetings between adverse parties and agency personnel in preparation for eventual settlement of a case.[31] Furthermore, Justice Brennan, noting the need for protecting attorney work-product information, has specifically cited as a particular disclosure danger the ability of adverse parties to "gain insight into the agency's general strategic and tactical approach to deciding when suits are brought . . . and on what terms they may be

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[27](...continued)
States Dep't of Justice, 612 F. Supp. 1143, 1145-46 (D.D.C. 1985); Norwood v. FAA, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984) (on motion for clarification and reconsideration); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 747-49 (D.D.C. 1983).

[28] County of Madison, 641 F.2d at 1040.

[29] Id.; see also Center for Auto Safety, 576 F. Supp. at 746 n.18 (quoting County of Madison, 641 F.2d at 1040); Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (public policy favoring compromise over confrontation would be "seriously undermined" if internal documents reflecting employees' thoughts during course of negotiations were released).

[30] Fulbright & Jaworski v. Department of the Treasury, 545 F. Supp. 615, 620 (D.D.C. 1982).

[31] See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege); Finkel v. HUD, No. 90-3106, slip op. at 3 (E.D.N.Y. Mar. 28, 1995) (deliberative process privilege) aff'd, No. 95-6112, 1996 U.S. App. LEXIS 2895, at *1 (2d Cir. Feb. 21, 1996); Wilson v. Department of Justice, No. 87-2415, slip op. at 8-11 (D.D.C. June 14, 1992) (attorney work-product privilege); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984) (attorney work-product privilege), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (unpublished table decision); see also FOIA Update, June 1982, at 10; cf. United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (draft consent decrees covered by both deliberative process and attorney work-product privileges; remanded for determination of whether privileges waived). But see Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257-58 (D.C. Cir. 1977) (certain documents prepared by agency concerning negotiations failed to reveal any inter-agency deliberations and therefore were not withholdable).

settled."[32]

Thus, the law with respect to settlement documents stands in a state of flux, with repeated judicial suggestions underscoring the dangers of their disclosure, but with substantial case precedents standing as obstacles to Exemption 5 protection for those documents that have been shared with opposing parties. All of the adverse decisions in this area, though, have failed to take cognizance of the more recent development of a distinct "settlement negotiation" privilege outside of the FOIA.[33] In addition, settlement information may qualify for protection under Exemption 4 where the information meets the "commercial or financial" threshold,[34] as well as under the more traditional Exemption 5 privileges. Accordingly, while such information may be withheld by agencies at the administrative level pursuant to Exemption 5 where there is a "foreseeable harm" in disclosure,[35] special care should be taken to maximize the prospects of favorable case law development on this delicate issue.

Additionally, it is not the "hypothetical litigation" between particular parties (in which relevance or need are appropriate factors) which governs the Exemption 5 inquiry;[36] rather, it is the circumstances in private litigation in which memoranda would "routinely be disclosed."[37] Therefore, whether the privilege invoked is absolute or qualified is of no significance.[38] Accordingly, no requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which

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[32] FTC v. Grolier Inc., 462 U.S. 19, 31 (1983) (Brennan, J., concurring) (emphasis added).

[33] See, e.g., Butta-Brinkman v. FCA Int'l Ltd., 164 F.R.D. 475, 477 (N.D. Ill. 1995); Olin Corp. v. Insurance Co. of N. America, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982); see also FOIA Update, Fall 1985, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations"). But see Burka v. HHS, 87 F.3d 508, 517 (D.C. Cir. 1996) (ruling that before certain material may be found privileged, agency must show that it is protected in discovery for reasons similar to those used by agency in FOIA context).

[34] See M/A-COM, 656 F. Supp. at 692 (applying privilege under Exemption 4).

[35] Accord Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions).

[36] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.16 (1975).

[37] H.R. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418.

[38] See Grolier, 462 U.S. at 27; see also FOIA Update, Fall 1984, at 6.

he is a party.[39] Indeed, such an approach, combined with a pragmatic application of Exemption 5's threshold language, is the only means by which the Supreme Court's firm admonition against use of the FOIA to circumvent discovery privileges can be given full effect.[40] Nevertheless, the mere fact that information may not generally be discoverable does not necessarily mean that it is not discoverable by a specific class of parties in civil litigation. Just as the FOIA's privacy exemptions are not used against a first-party requester,[41] a privilege that is designed to protect a certain class of persons cannot be invoked against those persons as FOIA requesters.[42]

Deliberative Process Privilege

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions."[43] Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.[44]

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[39] See Grolier, 462 U.S. at 28; Sears, 421 U.S. at 149; see also, e.g., Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987) ("the needs of a particular plaintiff are not relevant to the exemption's applicability"); Swisher v. Department of the Air Force, 660 F.2d 369, 371 (8th Cir. 1981) (fact that privilege may be overcome by showing of "need" in civil discovery context in no way diminishes Exemption 5 applicability).

[40] See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."); see also Martin, 819 F.2d at 1186 (Where a requester is "unable to obtain those documents using ordinary civil discovery methods, . . . FOIA should not be read to alter that result.").

[41] See H.R. Rep. No. 93-1380, at 13 (1974); see also FOIA Update, Spring 1989, at 4.

[42] See Julian, 486 U.S. at 13 (presentence report privilege, designed to protect reports' subjects, cannot be invoked against them as first-party requesters).

[43] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

[44] See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 23 (C.D. Cal. May 10, 1993) (release of predecisional documents may confuse public about agency policy and procedure), aff'd in part & rev'd in

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Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies."[45] In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.[46]

Indeed, in a major en banc decision, the Court of Appeals for the District of Columbia Circuit emphasized that even the mere status of an agency decision within an agency decisionmaking process may be protectible if the release of that information would have the effect of prematurely disclosing "the recommended outcome of the consultative process . . . as well as the source of any decision."[47] This is particularly important to agencies involved in a regulatory process that specifically mandates public involvement in the decision process once the agency's deliberations are complete.[48] Moreover, the predecisional character of a

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[44](...continued)
part on other grounds, 45 F.3d 1325 (9th Cir. 1995). But see ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1237-38 (D.C. Cir. 1983) (dictum) (suggesting that otherwise exempt predecisional material "may" be ordered released so as to explain actual agency positions), rev'd on other grounds, 466 U.S. 463 (1984).

[45] Sears, 421 U.S. at 150.

[46] See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Schell v. HHS, 843 F.2d 933, 940 (6th Cir. 1988) ("Because Exemption 5 is concerned with protecting the deliberative process itself, courts now focus less on the material sought and more on the effect of the material's release."); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes--not to protect specific materials."); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 117 (D.D.C. 1984) (ongoing regulatory process would be subject to "delay and disrupt[ion]" if preliminary analyses were prematurely disclosed); cf. Hennessey v. United States Agency for Int'l Dev., No. 97-1133, 1997 U.S. App. LEXIS 22975, at **10-11 (4th Cir. Sept. 2, 1997) (finding no "intra-agency `deliberative process,'" as agency intended all interested parties to be involved in decision); Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, slip op. at 6, (D. Me. Apr. 18, 1995) (deliberative process privilege inapplicable when by regulation entire decisionmaking process is open to all interested parties) (alternative holding).

[47] Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

[48] See id. at 776; see also National Wildlife, 861 F.2d at 1120-21 (draft forest plans and preliminary draft environmental impact statements protected); Chemical Mfrs., 600 F. Supp. at 118 (preliminary scientific data generated in
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document is not altered by the fact that an agency has subsequently made a final decision[49] or even has decided to not make a final decision.[50] Nor is it altered by the passage of time in general.[51]

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.[52] First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy."[53] Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[54] The burden is upon the agency to show that the information in question satisfies both requirements.[55]

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process."[56] On this point, the Su

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[48](...continued)
connection with study of chemical protected).

[49] See, e.g., Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); May v. Department of the Air Force, 777 F.2d 1012, 1014-15 (5th Cir. 1985); Cuccaro v. Secretary of Labor, 770 F.2d 355, 357 (3d Cir. 1985); see also FOIA Update, Fall 1995, at 5.

[50] See Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996).

[51] See, e.g., AGS Computers, Inc. v. United States Dep't of Treasury, No. 92-2714, slip op. at 13 (D.N.J. Sept. 16, 1993) (predecisional character not lost through passage of time); Founding Church of Scientology v. Levi, 1 Gov't Disclosure Serv. (P-H) ¶ 80,155, at 80,374 (D.D.C. Aug. 12, 1980). But see FOIA Update, Spring 1994, at 4 (advising that deliberative process sensitivity "fades with the passage of time").

[52] See Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))).

[53] Jordan, 591 F.2d at 774.

[54] Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

[55] See Southam News v. INS, No. 85-2721, slip op. at 16-17 (D.D.C. May 18, 1989).

[56] Coastal States, 617 F.2d at 868; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 559 (1st Cir. 1992); Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123 (D.C. Cir. 1989); Knowles v. Thornburgh, No. 90-1294, slip op. at 5-6 (D.D.C. Mar. 11, 1992) (information generated during
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preme Court has been very clear:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.[57]

Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, Exemption 5 can be applicable.[58] In a par

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[56](...continued)
process preceding President's ultimate decision on application for clemency held predecisional).

[57] Sears, 421 U.S. at 151 n.18; see also Schell, 843 F.2d at 941 ("When specific advice is provided, . . . it is no less predecisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use."); Hunt v. United States Marine Corp., 935 F. Supp. 46, 51 (D.D.C. 1996) (agency need not point specifically to final decision made); Chemical Mfrs., 600 F. Supp. at 118 ("[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . `part of the agency give-and-take--of the deliberative process--by which the decision itself is made'" (quoting Vaughn, 523 F.2d at 1144)); Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.D.C. 1989) (court "must give considerable deference to the agency's explanation of its decisional process, due to agency's expertise"). But cf. Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1094 (9th Cir. 1997) (oddly declaring Supreme Court pronouncement to be merely "cautionary dictum").

[58] See, e.g., Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., No. 89-2851, slip op. at 6 (D.D.C. July 20, 1992) (material prepared during compliance review that goes beyond critique of reviewed program to discuss broader agency policy held part of deliberative process), appeal voluntarily dismissed, No. 92-5346 (D.C. Cir. Dec. 13, 1993); Washington Post Co. v. DOD, No. 84-2949, slip op. at 21 (D.D.C. Feb. 25, 1987) (document generated in continuing process of examining agency policy falls within deliberative process); Ashley v. United States Dep't of Labor, 589 F. Supp. 901, 908-09 (D.D.C. 1983) (documents containing agency self-evaluations need not be shown to be part of clear process leading up to "assured" final decision so long as agency can demonstrate that documents were part of some deliberative process). But see Maricopa, 108 F.3d at 1094 (dictum) ("agency must identify a specific decision where document is pre-decisional"); Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (suggesting agency must specify final "decisions to which the advice or recommendations . . . contributed"); Cook v. Watt, 597 F. Supp. 545, 550-52 (D. Alaska 1983) (confusingly refusing to extend privilege to documents originating in deliberative process merely because process held in

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ticularly instructive decision, Access Reports v. Department of Justice,[59] the D.C. Circuit emphasized the importance of identifying the larger process to which a document sometimes contributes. Further, "predecisional" documents are not only those circulated within the agency, but can also be those from an agency lacking decisional authority which advises another agency possessing such authority.[60]

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,[61] that implement an established policy of an agency,[62] or that explain actions that an agency has already taken.[63] Exemption 5 does not apply to postdecisional documents, as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted."[64]

Indeed, many courts have questioned whether certain documents at issue were tantamount to agency "secret law," i.e., "orders and interpretations which [the agency] actually applies to cases before it,"[65] and which are "routinely used

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[58](...continued)
abeyance and no decision reached). Compare Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (holding document must be "essential element" of deliberative process), with Schell, 843 F.2d at 939-41 (appearing to reject, at least implicitly, "essential element" test).

[59] 926 F.2d 1192, 1196 (D.C. Cir. 1991); see also Taylor v. United States Dep't of the Treasury, No. C90-1928, slip op. at 3-4 (N.D. Cal. Jan. 20, 1991) (deliberative process privilege covers "communications leading to the actual enactment of a law, not merely communications preceding a decision to commence the process of amending a law").

[60] See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 188 (1975); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984); Blazar v. OMB, No. 92-2719, slip op. at 14 (D.D.C. Apr. 15, 1994) (recommendations from OMB to President, who had final decisionmaking authority, held predecisional).

[61] See, e.g., Taxation With Representation Fund v. IRS, 646 F.2d 666, 677-78 (D.C. Cir. 1981).

[62] See, e.g., Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

[63] See, e.g., Sears, 421 U.S. at 153-54. But cf. Murphy v. TVA, 571 F. Supp. 502, 505 (D.D.C. 1983) (protection afforded to "interim" decisions which agency retains option of changing).

[64] Sears, 421 U.S. at 152.

[65] Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

by agency staff as guidance."[66] Such documents should be disclosed because they are not in fact predecisional, but rather "discuss established policies and decisions."[67] Only those portions of a postdecisional document that discuss predecisional recommendations not expressly adopted can be protected.[68]

Several criteria have been fashioned to clarify the "often blurred" distinction between predecisional and postdecisional documents.[69] First, an agency should determine whether the document is a "final opinion" within the meaning of one of the two "automatic" disclosure provisions of the FOIA, subsection (a)(2)(A).[70] In an extensive consideration of this point, the Court of Appeals for the Fifth Circuit held that, as subsection (a)(2)(A) specifies "the adjudication of [a] case[]," Congress intended "final opinions" to be only those decisions resulting from proceedings (such as that in Sears) in which a party invoked (and obtained a decision concerning) a specific statutory right of "general and uniform" applicability.[71] However, the D.C. Circuit recently stated that field service advice

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[66] Coastal States, 617 F.2d at 869; see also Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983).

[67] Coastal States, 617 F.2d at 868; Hansen v. United States Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (draft document used by agency as final product ordered disclosed).

[68] See Sears, 421 U.S. at 151 (holding postdecisional documents subject to deliberative process privilege "as long as prior communications and the ingredients of the decisionmaking process are not disclosed"); see also Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only `report' what those recommendations and opinions are."); Blazar, No. 92-2719, slip op. at 15 (D.D.C. Apr. 15, 1994) (President's indication of which alternative he adopted does not waive privilege for unadopted recommendations); Steinberg v. United States Dep't of Justice, No. 91-2740, slip op. at 7 (D.D.C. Sept. 13, 1993) (protection of exemption not lost where decision to conduct particular type of investigation was only an intermediate step in larger process).

[69] See Schlefer, 702 F.2d at 237. See generally ITT, 699 F.2d at 1235; Arthur Andersen & Co. v. IRS, 679 F.2d 254, 258-59 (D.C. Cir. 1982); Tax Analysts v. IRS, No. 94-923, 1996 U.S. Dist. LEXIS 3259, at **4-8 (D.D.C. Mar. 15, 1996), aff'd, 117 F.3d 607 (D.C. Cir. 1997).

[70] 5 U.S.C. § 552(a)(2)(A) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997); see Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360-61 n.23 (1979).

[71] See Skelton v. United States Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982). But see Afshar v. Department of State, 702 F.2d 1125, 1142-43 (D.C. Cir. 1983) (even single recommendation of no precedential value or applicability to rights of individual members of public loses protection if specifically adopted as basis for

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memoranda issued by the Internal Revenue Service's Office of Chief Counsel are not predecisional documents as they are solely "statements of an agency's legal position."[72] This conclusion was reached even though the opinions were found to be "non-binding" on the ultimate decisionmakers.[73]

Second, the nature of the decisionmaking authority vested in the office or person issuing the document must be considered.[74] If the author lacks "legal decision authority," the document is far more likely to be predecisional.[75] A crucial caveat in this regard, however, is that courts often look "beneath formal lines of authority to the reality of the decisionmaking process."[76] Hence, even an assertion by the agency that an official lacks ultimate decisionmaking authority might be "superficial" and unavailing if agency "practices" commonly accord decisionmaking authority to that official.[77] Conversely, an agency official who appears to have final authority may in fact not have such authority or may not be wielding that authority in a particular situation.[78]

Careful analysis of the decisionmaking process is sometimes required to

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[71](...continued)
final decision).

[72] Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997).

[73] Id.

[74] See Pfeiffer, 721 F. Supp. at 340 ("What matters is that the person who issues the document has authority to speak finally and officially for the agency.").

[75] Grumman, 421 U.S. at 184-85; see also A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 147 (2d Cir. 1994) (staff attorney's recommendation predecisional as she had no authority to close investigation); Badhwar v. United States Dep't of the Air Force, 615 F. Supp. 698, 702-03 (D.D.C. 1985) (Air Force safety board does not make decisions, only recommendations), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); American Postal Workers Union v. Office of Special Counsel, No. 85-3691, slip op. at 6 (D.D.C. June 24, 1986) (prosecutorial recommendations to special counsel which were not binding or dispositive considered predecisional). But see Tax Analysts, 117 F.3d at 617 (Chief Counsel's "non-binding" opinions to field offices found not predecisional).

[76] Schlefer, 702 F.2d at 238; see also National Wildlife, 861 F.2d at 1123.

[77] Schlefer, 702 F.2d at 238, 241; see, e.g., Badran v. United States Dep't of Justice, 652 F. Supp. 1437, 1439 (N.D. Ill. 1987) (INS decision on plaintiff's bond was final, even though it was reviewable by immigration judge, because "immigration judges are independent from the INS, and no review of plaintiff's bond occurred within the INS").

[78] See, e.g., National Wildlife, 861 F.2d at 1122-23 (headquarters' comments on regional plans held to be opinions and recommendations); Jowett, 729 F. Supp. at 874 (audit reports prepared by entity lacking final decisionmaking authority held protectible).

determine whether the records reflect an earlier preliminary decision or recommendations concerning follow-up issues,[79] or whether the document sought reflects a final decision or merely advice to a higher authority.[80] Thus, agency recommendations to OMB concerning the development of proposed legislation to be submitted to Congress are predecisional,[81] but descriptions of "agency efforts to ensure enactment of policies already established" are postdecisional.[82]

Third, it is useful to examine the direction in which the document flows along the decisionmaking chain. Naturally, a document "from a subordinate to a superior official is more likely to be predecisional"[83] than is the contrary case: "[F]inal opinions . . . typically flow from a superior with policymaking authority to a subordinate who carries out the policy."[84] However, under cer

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[79] See, e.g., City of Va. Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1254 (4th Cir. 1993) (protecting documents discussing past decision as it impacts on future decision); Access Reports, 926 F.2d at 1196 (staff attorney memo on how proposed FOIA amendments would affect future cases not post-decisional working law but opinion on how to handle pending legislative process); Hamrick v. Department of the Navy, No. 90-283, slip op. at 4 (D.D.C. Aug. 28, 1992) ("[D]ocuments prepared after [agency's] decision to dual source the F404 engines are not `formal agency policy,' but, recommendations for future decisions relating to F404 procurement based upon lessons learned from the dual sourcing decisionmaking process."), appeal voluntarily dismissed, No. 92-5376 (D.C. Cir. Aug. 4, 1995); Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 574-75 (D.D.C. 1984).

[80] See, e.g., American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 208 (D.C. Cir. 1990); Bureau of Nat'l Affairs, 742 F.2d at 1497.

[81] See Bureau of Nat'l Affairs, 742 F.2d at 1497.

[82] Dow, Lohnes & Albertson v. USIA, No. 82-2569, slip op. at 15-16 (D.D.C. June 5, 1984), vacated in part, No. 84-5852 (D.C. Cir. Apr. 17, 1985); see also Badhwar v. United States Dep't of Justice, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing predecisional about a recitation of corrective action already taken.").

[83] Coastal States, 617 F.2d at 868; see also Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992) ("recommendation to a supervisor on how to proceed is predecisonal by nature"); MCI Telecomms. Corp. v. GSA, No. 89-746, slip op. at 9-10 (D.D.C. Mar. 25, 1992) (guidelines developed by panel members making recommendations, not final decisionmaker, held predecisional); Government Accountability Project v. Office of Special Counsel, No. 87-235, slip op. at 5-6 (D.D.C. Feb. 22, 1988) (protected documents "plainly contain advisory positions adopted by officials subordinate in rank to the final decisionmakers").

[84] Brinton, 636 F.2d at 605; see also American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1276 (D.D.C. 1986);

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tain circumstances, recommendations can flow from the superior to the subordinate.[85] Perhaps most important of all is to consider the "`role, if any, that the document plays in the process of agency deliberations.'"[86]

Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decisionmaker "chooses expressly to adopt or incorporate [it] by reference."[87] At least one court, though, has suggested a less stringent standard of "formal or informal adoption."[88] Also, although mere "approval" of a predecisional document does not necessarily constitute adoption of it,[89] an inference of incorporation or adoption has twice been found to exist where a decisionmaker accepted a staff recommendation without giving a statement of reasons.[90] Where it is unclear whether a recommendation provided the basis for a final decision, the recommendation should be pro-

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[84](...continued)
Ashley, 589 F. Supp. at 908.

[85] See National Wildlife, 861 F.2d at 1123 (comments from headquarters to regional office found, under circumstances presented, to be advisory rather than directory).

[86] Formaldehyde, 889 F.2d at 1122 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987).

[87] Sears, 421 U.S. at 161; see, e.g., Afshar, 702 F.2d at 1140 (recommendation expressly adopted in postdecisional memorandum); Brotherhood of Locomotive Eng'rs v. Surface Transp. Bd., No. 96-1153, 1997 WL 446261, at **4-5 (D.D.C. July 31, 1997) (finding staff recommendation adopted in both written decision and commission vote); Burkins v. United States, 865 F. Supp. 1480, 1501 (D. Colo. 1994) (final report's statement that findings are same as those of underlying memorandum found to be adoption of that document); Atkin v. EEOC, No. 91-2508, slip op. at 23-24 (D.N.J. July 14, 1993) (recommendation to close file not protectible where contained in agency's actual decision to close file).

[88] Coastal States, 617 F.2d at 866; see also Pentagon Fed. Credit Union v. National Credit Union Admin., No. 95-1475, slip op. at 5-8 (E.D. Va. June 7, 1996) (finding that board of directors' action "embracing" recommendations in "substantially same language" made documents postdecisional); American Soc'y of Pension Actuaries v. IRS, 746 F. Supp. 188, 192 (D.D.C. 1990) (ordering disclosure after finding that IRS's budget assumptions and calculations were "relied upon by government" in making final estimate for President's budget); cf. Skelton, 678 F.2d at 39 n.5 (dictum).

[89] See, e.g., American Fed'n of Gov't Employees v. Department of the Army, 441 F. Supp. 1308, 1311 (D.D.C. 1977).

[90] See American Soc'y of Pension Actuaries, 746 F. Supp. at 191; Martin v. MSPB, 3 Gov't Disclosure Serv. (P-H) ¶ 82,416, at 83,044 (D.D.C. Sept. 14, 1982). But see American Postal Workers Union, No. 85-3691, slip op. at 7-9 (D.D.C. June 24, 1986) (incorporation not inferred).

tectible.[91]

A second primary limitation on the scope of the deliberative process privilege is that of course it applies only to "deliberative" documents and it ordinarily is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda.[92] Not only would factual material "generally be available for discovery,"[93] but its release usually will not threaten consultative agency functions.[94] This seemingly straightforward distinction between deliberative and factual materials can blur, however, where the facts themselves reflect the agency's deliberative process[95]--which has prompted the D.C. Circuit to observe that "the use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases."[96] In fact, the full D.C. Circuit has firmly declared that factual information should be examined "in light of the policies and goals that underlie" the privilege and in "the context in which the materials are used."[97]

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts generally allow agencies to withhold factual material in an otherwise "deliberative" document under two general types of circumstances.[98] The first circumstance occurs when the author of a document selects specific facts out of a larger group of facts and this very act is deliberative in nature. In Montrose Chemical Corp. v. Train, for example, the summary of a large volume of public

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[91] See Grumman, 421 U.S. at 184-85; Afshar, 702 F.2d at 1143 n.22; see, e.g., Greyson v. McKenna & Cuneo, 879 F. Supp. 1065, 1069 (D. Colo. 1995) (use of phrase "the evidence shows" not enough for inference of adoption); Africa Fund v. Mosbacher, No. 92-289, slip op. at 19 (S.D.N.Y. May 26, 1993) (record did not suggest either "adoption" or "final opinion" of agency); Wiley Rein & Fielding v. United States Dep't of Commerce, No. 90-1754, slip op. at 6 (D.D.C. Nov. 27, 1990) ("Denying protection to a document simply because the document expresses the same conclusion reached by the ultimate agency decision-maker would eviscerate Exemption 5."); Ahearn v. United States Army Materials & Mechanics Research Ctr., 580 F. Supp. 1405, 1407 (D. Mass. 1984) (fact that general officer reached same conclusion as report of investigation did not constitute adoption of report's reasoning).

[92] See, e.g., Coastal States, 617 F.2d at 867.

[93] EPA v. Mink, 410 U.S. 73, 87-88 (1973).

[94] See Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974).

[95] See, e.g., Skelton, 678 F.2d at 38-39.

[96] Dudman, 815 F.2d at 1568.

[97] Wolfe, 839 F.2d at 774; see also National Wildlife, 861 F.2d at 1119 ("ultimate objective" of Exemption 5 is to safeguard agency's deliberative process).

[98] See FOIA Update, Summer 1986, at 6.

testimony compiled to facilitate the EPA Administrator's decision on a particular matter was held to be part of the agency's internal deliberative process.[99] The very act of distilling the testimony, of separating the significant facts from the insignificant facts, constituted an exercise of judgment by agency personnel.[100] Such "selective" facts are therefore entitled to the same protection as that afforded to purely deliberative materials, as their release would "permit indirect inquiry into the mental processes,"[101] and so "expose" predecisional agency deliberations.[102] Thus, to protect the factual materials, an agency must identify a process which "could reasonably be construed as predecisional and deliberative."[103]

A D.C. Circuit opinion concerning a report consisting of factual materials prepared for an Attorney General decision on whether to allow former U.N. Secretary General Kurt Waldheim to enter the United States provides an illustration of this factual/deliberative distinction and of the breadth of deliberative process privilege coverage under existing case law.[104] The D.C. Circuit found that "the majority of [the report's] factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action," and that it

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[99] 491 F.2d at 71.

[100] Id. at 68; see, e.g., Atkin, No. 91-2508, slip op. at 21 (D.N.J. July 14, 1993) (staff selection of certain factual documents to be used for report preparation held deliberative); Bentson Contracting Co. v. NLRB, No. 90-451, slip op. at 3 (D. Ariz. Dec. 28, 1990) (document characterizing issues most important to parties and how factual framework is utilized to determine precedent used in rendering decision held deliberative).

[101] Williams, 556 F. Supp. at 65.

[102] Mead Data, 566 F.2d at 256; see also Providence Journal, 981 F.2d at 562 (revealing IG's factual findings would divulge substance of related recommendations); Lead Indus., 610 F.2d at 85 (disclosing factual segments of summaries would reveal deliberative process by "demonstrating which facts in the massive rule-making record were considered significant to the decisionmaker"); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1373 (E.D.N.C. 1986) (list of farmworker camps was "selective fact" and thus protected).

[103] City of Va. Beach, 995 F.2d at 1255; see also ITT, 699 F.2d 1219, 1239 (D.C. Cir. 1983) (notes must be more than "straightforward factual narrations" to be protected); Playboy Enters. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982) (factual materials must be generated in course of agency's decision-making process); Lacy v. United States Dep't of the Navy, 593 F. Supp. 71, 78 (D. Md. 1984) (photographs attached to deliberative report "do not become part of the deliberative process merely because some photographs were selected and others were not").

[104] Mapother, 3 F.3d at 1538-40.

therefore fell within the deliberative process privilege.[105] By contrast, it also held that a chronology of Waldheim's military career was not deliberative, as it was "neither more nor less than a comprehensive collection of the essential facts" and "reflect[ed] no point of view."[106] Significantly, this entire report was found to be appropriate for discretionary disclosure pursuant to the litigation review instituted by Attorney General Reno's FOIA Memorandum of October 4, 1993,[107] and it was subsequently released in full.[108]

The second such circumstance is when the information is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. If revealing factual information is tantamount to revealing the agency's deliberations, then the facts may be withheld.[109] For example, the D.C. Circuit has held that the deliberative process privilege covers construction cost estimates, which the court characterized as "elastic facts,"

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[105] Id. at 1539 (distinguishing and confining Playboy as involving report designed only to inform Attorney General of facts he would make available to Member of Congress, rather than one involving any decision he would have to make); see also City of Va. Beach, 995 F.2d at 1255 (similarly observing that in Playboy "[the] agency identified no decision in relation to the withheld investigative report").

[106] Mapother, 3 F.3d at 1539-40.

[107] Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions).

[108] See FOIA Update, Spring 1994, at 1; see also FOIA Update, Fall 1994, at 7 (listing additional such examples).

[109] See, e.g., Wolfe, 839 F.2d at 774-76 ("fact" of status of proposal in deliberative process protected); Brownstein Zeidman & Schomer v. Department of the Air Force, 781 F. Supp. 31, 36 (D.D.C. 1991) (release of summaries of negotiations would inhibit free flow of information as "summaries are not simply the facts themselves"); Jowett, 729 F. Supp. at 877 (manner of selecting and presenting even most factual segments of audit reports would reveal process by which agency's final decision is made); Washington Post Co. v. DOD, No. 84-2403, slip op. at 5 (D.D.C. Apr. 15, 1988) (factual assertions in briefing documents found "thoroughly intertwined" with opinions and impressions); Washington Post, No. 84-2949, slip op. at 23 (D.D.C. Feb. 25, 1987) (summaries and lists of materials relied upon in drafting report found "inextricably intertwined with the policymaking process"). But see Army Times Publ'g Co. v. Department of the Air Force, No. 90-1383, slip op. at 8 (D.D.C. Feb. 28, 1995) (aggregate results of surveys found to be merely basis for opinions and not themselves deliberative in nature).

finding that their disclosure would reveal the agency's deliberations.[110]

Similarly, when factual or statistical information is actually an expression of deliberative communications, it may be withheld on the basis that to reveal that information would reveal the agency's deliberations.[111] Exemption 5 thus covers scientific reports that constitute the interpretation of technical data, insofar as "the opinion of an expert reflects the deliberative process of decision or policy making."[112] It has even been extended to cover successive reformulations of computer programs that were used to analyze scientific data.[113] The government interest in withholding technical data is heightened if such material is requested at a time when disclosure of a scientist's "nascent thoughts . . . would discourage the intellectual risktaking so essential to technical progress."[114] Moreover, it is noteworthy that the D.C. Circuit has stated that the "results of . . . factual investigations" may be within the protective scope of Exemption 5.[115] However, the D.C. Circuit also has emphasized that agencies bear the burden of demonstrating that disclosure of such information "would actually inhibit candor in the

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[110] Quarles v. Department of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990).

[111] See, e.g., Kennecott Utah Copper Corp. v. EPA, No. 94-162, slip op. at 4 (D.D.C. Sept. 11, 1995) (material relating to preparation of "Hazard Ranking Scores" held part of deliberative process); SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force, No. 88-481, slip op. at 3 (D.D.C. Mar. 31, 1989) (technical scores and technical rankings of competing contract bidders held predecisional and deliberative); National Wildlife Fed'n v. United States Forest Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (variables reflected in computer program's mathematical equation held protectible); American Whitewater Affiliation v. Federal Energy Regulatory Comm'n, No. 86-1917, slip op. at 7 (D.D.C. Dec. 2, 1986) ("the cost and energy comparisons involved in this case are deliberative"); Brinderson Constructors, Inc. v. United States Army Corps of Eng'rs, No. 85-905, slip op. at 11 (D.D.C. June 11, 1986) ("computations are certainly part of the deliberative process"); Professional Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (scores used to rate procurement proposals may be "numerical expressions of opinion rather than `facts'").

[112] Parke, Davis, 623 F.2d at 6; see also Quarles, 893 F.2d at 392-93 (cost estimates held protectible as "elastic facts"); National Wildlife, 861 F.2d at 1120 ("opinions on facts and their [sic] consequences of those facts form the grist for the policymaker's mill"). But see Ethyl Corp. v. EPA, 478 F.2d 47, 50 (4th Cir. 1973) (characterizing such material as "technological data of a purely factual nature").

[113] See Cleary, Gottlieb, Steen & Hamilton v. HHS, 884 F. Supp. 770, 782-83 (D.D.C. 1993).

[114] Chemical Mfrs., 600 F. Supp. at 118.

[115] Paisley v. CIA, 712 F.2d 686, 698 n.53 (D.C. Cir. 1983) (dictum).

decision-making process."[116]

Documents that are commonly encompassed by the deliberative process privilege include "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated,"[117] the release of which would likely "stifle honest and frank communication within the agency."[118] Accordingly, though the case law is not yet entirely settled on the point, "briefing materials"--such as reports or other documents which summarize issues and advise superiors--should be protectible under the deliberative process privilege.[119]

A particular category of documents likely to be found exempt under the

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[116] Army Times Publ'g Co. v. Department of the Air Force, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (agencies must show how process would be harmed where some factual material was released and similar factual material was withheld); see also American Petroleum Inst. v. EPA, 846 F. Supp. 83, 90-91 (D.D.C. 1994) (agency ordered to show how factual information could reveal deliberative process).

[117] Sears, 421 U.S. at 150; see also National Wildlife, 861 F.2d at 1121 ("Recommendations on how to best deal with a particular issue are themselves the essence of the deliberative process."); Four Corners Action Coalition v. United States Dep't of the Interior, No. 92-Z-2106, transcript at 4-5 (D. Colo. Dec. 9, 1992) (bench order) (marginal notes and editorial comments reflect deliberative process); Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 9 (D.N.M. June 22, 1991) (notes written in margins of documents constitute deliberations of documents' recipient); Jowett, 729 F. Supp. at 875 (documents that are "part of the give-and-take between government entities"); Strang v. Collyer, 710 F. Supp. 9, 12 (D.D.C. 1989) (meeting notes that reflect the exchange of opinions or give-and-take between agency personnel or divisions of agency), aff'd sub nom. Strang v. DeSio, 899 F.2d 1268 (D.C. Cir. 1990) (unpublished table decision).

[118] Coastal States, 617 F.2d at 866; see also Schell, 843 F.2d at 942 ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect.").

[119] See Access Reports, 926 F.2d at 1196-97 (dictum); Thompson v. Department of the Navy, No. 95-347, 1997 U.S. Dist. LEXIS 12583, at **10-13 (D.D.C. Aug. 18, 1997) (holding materials created to brief senior officials who were preparing to respond to media inquiries protectible); Hunt, 935 F. Supp. at 52 (holding "point papers" compiled to assist officers in formulating decision protectible); Washington Post, No. 84-2949, slip op. at 23 (D.D.C. Feb. 25, 1987) (holding summaries and lists of material compiled for general's report preparation protectible); Williams v. United States Dep't of Justice, 556 F. Supp. 63, 65 (D.D.C. 1982) (holding "briefing papers prepared for the Attorney General prior to an appearance before a congressional committee" protectible); see also FOIA Update, Fall 1988, at 5. But see National Sec. Archive v. FBI, No. 88-1507, slip op. at 3-5 (D.D.C. Apr. 15, 1993) (finding briefing papers not protectible).

deliberative process privilege is "drafts,"[120] although it has been observed that such a designation "does not end the inquiry."[121] It should be remembered, though, that the very process by which a "draft" evolves into a "final" document can itself constitute a deliberative process warranting protection.[122] As a result, Exemption 5 protection can be available to a draft document regardless of whether it differs from its final version.[123]

Several years ago, the factual/deliberative distinction led to sharply contrasting decisions by two circuit courts of appeal, where the issue was the Commerce Department's withholding of numeric material.[124] Both the Assembly of

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[120] See, e.g., City of Va. Beach, 995 F.2d at 1253; Town of Norfolk v. United States Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Dudman, 815 F.2d at 1569; Russell, 682 F.2d at 1048; Lead Indus., 610 F.2d 70, 85-86 (2d Cir. 1979).

[121] Arthur Andersen, 679 F.2d at 257 (citing Coastal States, 617 F.2d at 866); see also Petroleum Info., 976 F.2d at 1436 n.8 (suggesting new harm standard for "mundane," nonpolicy-oriented documents, which can include drafts); see also Lee v. FDIC, 923 F. Supp. 451, 458 (S.D.N.Y. 1996) (document's draft status not sufficient reason for automatic exemption from disclosure); Hansen, 817 F. Supp. at 124-25 (unpublished internal document lost draft status when consistently treated by agency as finished product over many years).

[122] See, e.g., National Wildlife, 861 F.2d at 1122 ("To the extent that [the requester] seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft[s] prepared by lower-level [agency] personnel and those actually adopted . . . , it is attempting to probe the editorial and policy judgments of the decisionmakers."); Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987) ("[E]xemption protects not only the opinions, comments and recommendations in the draft, but also the process itself."); Dudman, 815 F.2d at 1568-69; Russell, 682 F.2d at 1048-50; Pies v. IRS, 668 F.2d 1350, 1353-54 (D.C. Cir. 1981); Rothschild v. CIA, No. 91-1314, slip op. at 6-7 (D.D.C. Mar. 25, 1992) (extending protection to "marginalia consisting of comments, opinions, further relevant information and associated notes" on drafts); Oxy USA Inc. v. United States Dep't of Energy, No. 88-C-541-B, slip op. at 5 (N.D. Okla. July 13, 1989) (agency need not show extent to which draft differs from final document, because to do so would itself expose what occurred in deliberative process); Strang, 710 F. Supp. at 12; Exxon, 585 F. Supp. at 698; see also FOIA Update, Spring 1986, at 2; FOIA Update, Jan. 1983, at 6.

[123] See Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta); Lead Indus., 610 F.2d at 86; see also Exxon, 585 F. Supp. at 698; City of W. Chicago v. NRC, 547 F. Supp. 740, 751 (N.D. Ill. 1982); FOIA Update, Spring 1986, at 2. But see Texaco, Inc. v. United States Dep't of Energy, 2 Gov't Disclosure Serv. (P-H) ¶ 81,296, at 81,833 (D.D.C. Oct. 13, 1981) (aberrational ruling, without analysis, to the contrary).

[124] Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992); Florida House of Representatives v. United States Dep't of

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the State of California and the Florida House of Representatives sought "adjusted" census figures for their respective states that were developed in the event that the Secretary of Commerce decided to adjust the 1990 census, an event that did not occur.[125] The Court of Appeals for the Eleventh Circuit applied a rigid "fact or opinion" test in determining whether such numerical data are protectible.[126] It viewed the census data as "opinion" that was ultimately rejected by the decision-maker and therefore held them to be withholdable pursuant to the deliberative process privilege.[127] The Court of Appeals for the

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[124](...continued)
Commerce, 961 F.2d 941 (11th Cir. 1992).

[125] Assembly of Cal., 968 F.2d at 917-18; Florida House of Representatives, 961 F.2d at 943-44.

[126] Florida House of Representatives, 961 F.2d at 950.

[127] Id.